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MEMORANDUM

TO: Interested persons

FROM: Office of Legislative Legal Services

DATE: November 2, 2018

SUBJECT: Open Meetings Law - State Public Body - FAQ¹

The following is an overview of the Open Meetings Law, as it applies to a public body at the state government level, in a Frequently Asked Question format.

1. What is the Open Meetings Law?

Part 4 of article 6 of title 24, C.R.S., is commonly known as the Open Meetings Law ("OML"). The law originated in a citizen initiative known as the "Colorado Sunshine Act of 1972". Though amended over the years, its purpose has remained constant—"that the formation of public policy is public business and may not be conducted in secret."² It is "clearly intended to afford the public access to a broad range of meetings at which public business is considered".³ And Colorado Courts interpret it broadly "in order to further the legislature's intent to give citizens a greater opportunity to meaningfully participate in the decision-making process by becoming fully informed on issues of public importance."⁴

¹ This legal memorandum results from a request made to the Office of Legislative Legal Services (OLLS), a staff agency of the General Assembly. OLLS legal memoranda do not represent an official legal position of the General Assembly or the State of Colorado and do not bind the members of the General Assembly. They are intended for use in the legislative process and as information to assist the members in the performance of their legislative duties.

² Section 24-6-401, C.R.S.

³ *Benson v. McCormick*, 578 P.2d 651, 652 (Colo. 1978).

⁴ *Intermountain Rural Elec. Ass'n v. Colo. PUC*, 298 P.3d 1027, 1029 (Colo. App. 2012) (internal citations omitted).

2. Who does the OML apply to?

The OML applies to each "state public body" and "local public body".⁵

3. When is a gathering of a state public body a "meeting" under the OML?

A "meeting" under the OML means "any kind of gathering, convened to discuss public business, in person, by telephone, electronically, or by other means of communication."⁶ Electronic mail communication between elected officials that does not relate to the merits or substance of pending legislation or other public business is not considered a "meeting."⁷ "Merits or substance" means any discussion, debate, or exchange of ideas related to the essence of any public policy proposition, specific proposal, or any other matter being considered by the governing entity.⁸

Based on the OML as a whole and prior decisions, the Colorado Supreme Court held that "a meeting must be part of the policy-making process to be subject to the requirements of the OML" and that "a meeting is part of the policy making process if it concerns a matter related to the policy-making function of the . . . public body holding or attending the meeting."⁹ So, there must be "a meaningful connection between the meeting itself and the policy-making powers of the public body holding or attending the meeting",¹⁰ in order to be subject to the OML.

Such a link exists if a meeting is held to "discuss or undertake . . . a rule, regulation, ordinance, or a formal action" or if "a meeting was held for the purpose of discussing a pending measure or action, which is subsequently 'rubber stamped' by the public body holding or attending the meeting."¹¹

Accordingly, the types of gatherings of the members of a state public body that would be "meetings" under the OML certainly includes formal actions that ordinarily require a vote. But other meetings that do not necessarily involve an actual vote may also be considered a "meeting".

⁵ Section 24-6-402 (1) (a) and (1) (d), C.R.S. The application of the OML to a "local public body" which *generally* includes cities, counties, school districts, and other political subdivisions of the state, is not addressed by this memo.

⁶ Section 24-6-402 (1) (b), C.R.S.

⁷ Section 24-6-402 (2) (d) (III), C.R.S.

⁸ *Id.*

⁹ *Bd. of County Comm'rs v. Costilla County Conservancy Dist.*, 88 P.3d 1188, 1194 (Colo. 2004).

¹⁰ *Id.*

¹¹ *Id.*

The OML specifies that if elected officials exchange email to discuss pending legislation or other public business among themselves, the email can be considered a "meeting."¹² However, the OML goes on to clarify that "electronic mail communication between elected officials that does not relate to the merits or substance of pending legislation, including email communication regarding scheduling and availability or email communication that is sent by an elected official for the purpose of forwarding information, responding to an inquiry from an individual who is not a member of the applicable public body, or posing a question for later discussion by the public body, is not considered a meeting for purposes of the OML."¹³

4. When does a meeting of a state public body have to be open?

The OML establishes that any meeting of two or more members of a state public body are public meetings open to the public at all times:

- At which any public business is discussed; or
- At which any formal action may be taken.¹⁴

Even if these two conditions are met, the gathering must also qualify as a "meeting", as previously described, which could somewhat limit the application of the OML.

If the meeting is open, any person can join the meeting, including any member of the press. But being open does not guarantee a right of those persons to participate in the meeting.

5. When does a meeting of a state public body have to be noticed?

The OML requires that full and timely notice be given before any meeting of a state public body is held at which:

- The adoption of any proposed policy, position, resolution, rule, regulation, or formal action occurs; or
- At which a majority or quorum of the body is in attendance, or is expected to be in attendance.¹⁵

¹² Section 24-6-402 (1) (d) (III), C.R.S.

¹³ *Id.*

¹⁴ Section 24-6-402 (2) (a), C.R.S.

¹⁵ Section 24-6-402 (2) (c), C.R.S.

The notice requirement for formal meetings of a state public body is usually not an issue. It is the informal meetings that present more issues. Whether notice is required for them will depend on whether the gathering qualifies as a "meeting" under the OML, the number of invitees or attendees, and, in some cases, what happens after the meeting.

6. What is "full and timely notice" for a meeting?

The OML does not specify what constitutes "full and timely notice" for a meeting of a state public body. In looking at the OML's notice requirement, the Colorado Supreme Court has "adopted a 'flexible' standard that would take into account the interest in providing access to 'a broad range of meetings at which public business is considered,' as well as the public body's need to conduct its business in a reasonable manner."¹⁶

Consistent with this approach, at the very minimum, notice of a meeting should be posted within a reasonable time prior to the meeting either electronically or in an area that is open to public view. And this notice or posting should be done consistently for all meeting notices.

7. Do the requirements of the OML apply even if the meeting is called by or attended by someone other than members of the state public body?

Yes. A gathering that includes participants other than members of a state public body may still be considered a "meeting" for purposes of the OML, and, for purposes of compliance with the OML, it does not matter whether the particular state public body or another person calls the meeting.¹⁷

8. When can a state public body go into an executive session?

The OML allows for a state public body to go into executive session under certain statutorily prescribed circumstances.¹⁸ If, in the judgment of the state public body, public disclosure of certain matters or negotiations in an open meeting is likely to stifle honest and frank discussion, it may consider whether any of those matters or

¹⁶ *Town of Marble v. Darien*, 181 P.3d 1148, 1152 (Colo. 2008) quoting *Benson v. McCormick*, 578 P.2d 651, 653 (Colo. 1983).

¹⁷ For example, the Garfield County Bd. of County Comm'rs settled an OML lawsuit that was related to a private meeting held in Vernal, Utah, with representatives of the oil shale industry. See http://www.denverpost.com/breakingnews/ci_21782842/garfield-commissioners-settle-lawsuit-over-disputed-oil-shale

¹⁸ Section 24-6-402 (3) (a), C.R.S.

negotiations are permitted by the OML to be discussed in an executive session. This allows for a discussion by members of the state public body that is closed to the public if the topic of the contemplated discussion is one permitted to be discussed in executive session by the OML.

Topics that are the most likely potential reasons for a state public body to go into an executive session are:

- The purchase or sale of property for public purposes;
- Conferences with an attorney representing the state public body concerning disputes involving the public body, concerning specific claims or grievances, or for purposes of receiving legal advice on specific legal questions; and
- Matters required to be kept confidential in accordance with any federal or state law, or other joint rule of the house and senate.¹⁹

9. What happens if a state public body violates the provisions of the OML?

The general rule is that a resolution, rule, regulation, ordinance, or a formal action of a state public body is invalid.²⁰ Colorado courts have jurisdiction to issue injunctions to enforce the purposes of the OML in an action brought by any citizen of Colorado and a prevailing citizen in an OML action is awarded costs and attorney fees.²¹

In addition, a real or perceived failure to comply with the OML is likely to result in public and media criticism of the state public body's members involved in that meeting. Accordingly, consistent with the OML's purpose, it is a best practice when it is a close call or question of the OML's applicability to open and give notice of a meeting in question.

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¹⁹ Section 24-6-402 (3) (a) (I) to (3) (a) (III), C.R.S.

²⁰ Section 24-6-402 (8), C.R.S.

²¹ Section 24-4-402 (9), C.R.S.